KUMARESAN RAMASAMY A

v.

TIMBALAN MENTERI DALAM NEGERI MALAYSIA & ORS

B

HIGH COURT MALAYA, IPOH
CHOONG SIEW KHIM JC
[CRIMINAL APPLICATION NO: 44-10-2009]
28 OCTOBER 2009

C

CONSTITUTIONAL LAW: *Double jeopardy - Federal Constitution, art. 7(2) - Applicant detained under s. 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Applicant subsequently convicted and sentenced under s. 324 Penal Code on same matter and facts - Whether applicant subjected to double jeopardy*

D

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 s. 4(1) - Habeas corpus - Applicant subsequently convicted and sentenced under s. 324 Penal Code on same matter and facts - Whether applicant subjected to double jeopardy - Whether detention unlawful - Whether art. 7(2) Federal Constitution violated*

E

PREVENTIVE DETENTION: *Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 s. 4(1) - Habeas corpus - Applicant subsequently convicted and sentenced under s. 324 Penal Code on same matter and facts - Whether applicant subjected to double jeopardy - Whether detention unlawful - Whether art. 7(2) Federal Constitution violated*

F

PREVENTIVE DETENTION: *Detention - Whether lawful - Habeas corpus, application for - Applicant detained under s. 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Applicant subsequently convicted and sentenced under s. 324 Penal Code on same matter and facts - Whether applicant subjected to double jeopardy - Whether detention unlawful - Whether art. 7(2) Federal Constitution violated*

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The applicant was detained for two years at the Simpang Rengam Rehabilitation Centre under a detention order issued by the Deputy Minister of Home Affairs, Malaysia (the first respondent) on 19 June 2009 under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance"). The

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applicant was said to have assaulted and injured his victims armed with a car steering lock. The applicant had also been charged under s. 324 of the Penal Code on the same matter and facts at the Petaling Jaya Magistrate's Court and was sentenced to eight months' imprisonment. The applicant filed this application for a writ of *habeas corpus*. It was argued that the applicant had been subjected to double jeopardy that violated art. 7(2) of the Federal Constitution.

Held (dismissing the application):

(1) As of 19 June 2009 when the detention order was issued, the charge was still pending against the applicant who pleaded guilty subsequently on 23 July 2009. He was not convicted as of the date of the detention order. Therefore the argument that the applicant had been previously sentenced leading to double jeopardy was without basis. (para 8)

(2) Article 7(2) of the Federal Constitution would be applicable only in a case where a person has been charged previously, was convicted or acquitted of that charge and was again charged for the same offence except when there was an order for retrial as so provided. The applicant was not charged again and tried but detained without trial under the Ordinance. Although the applicant had been charged prior to the issuance of the detention order and subsequently convicted for the same offence, the first respondent was not barred from issuing the detention order based on facts arising from the same offence. The first respondent had executed his power under the Ordinance that is totally separate from the Public Prosecutor's power to institute criminal proceedings under the Criminal Procedure Code. The argument that the applicant was already charged and/or convicted and sentenced for the same offence and ought not to have been detained on the same ground must fail because the first respondent executed his power and prerogative to issue the detention order under the Ordinance without reference or subject to criminal proceedings had or pending against the applicant. (para 9)

Case(s) referred to:

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Saravanan KS Somu v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 1 CLJ 336 HC ***(refd)***

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Federal Constitution, art. 7(2)
Penal Code, s. 324

For the applicant - Sundarajan; M/s Sundarajan & Co
For the respondent - Asliza Ali FC

Reported by Amutha Suppayah

JUDGMENT

Choong Siew Khim JC:

[1] The applicant, Kumaresan Ramasamy, was detained for two years at the Simpang Rengam Rehabilitation Centre under a detention order issued by the Deputy Minister of Home Affairs, Malaysia (the first respondent) on 19 June 2009. Enclosure 3 is an application for a writ of *habeas corpus*.

[2] Various grounds were raised by the applicant in encl. 4, his affidavit supporting the application. It was however commendable that on this day when the application was heard, learned counsel for the applicant, Mr. Sundarajan, zeroed in on one main issue that centres on art. 7(2) of the Federal Constitution that provides:

> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

[3] Exhibit "K2" annexed to the supporting affidavit lay out the grounds and allegations of facts that influenced and caused the first respondent to be satisfied that the applicant shall be detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance"). I reproduce the pertinent fifth allegation of facts on which the detention order was based and over which the applicant took issue:

> 5. Bahawa kamu pada 11.05.2008, jam lebih kurang 4.00 pagi, bertempat di perhentian bas Taman Puchong Hartamas, Batu 14, Puchong, Selangor, bersama seorang rakan sejenayah dengan niat bersama telah memukul mangsa seorang lelaki India bersama kawan mangsa dengan bersenjatakan steering lock kereta. Akibat dari kejadian tersebut, mangsa telah mengalami kecederaan di bahagian kepala dan mendapat lebih kurang 10 jahitan manakala kawan mangsa mengalami kecederaan di bahagian kepala dan pinggang.

[4] It came to pass that the applicant was charged under s. 324 of the Penal Code on the same matter and facts *vide* case M3-83-138-2009 at the Petaling Jaya magistrate's court. He was sentenced to eight months' imprisonment. When this was imposed is not certain from the charge-sheet and letter issued by the Petaling Jaya magistrate's court in exh. "K3" of encl. 4. Nonetheless, it was averred by the applicant in encl. 4 *vide* para. 10 that he pleaded guilty to the charge on 23 July 2009 and he was sentenced to eight months' imprisonment from the date of arrest.

[5] On this point, the applicant took issue that he had been subjected to double jeopardy that violated art. 7(2) of the Federal Constitution. His counsel relied on the case of *Saravanan KS Somu v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 1 CLJ 336. In this case, the applicant was charged for a similar offence in the Sessions Court that was still pending. Balia Yusof Wahi JC (as he then was) dismissed the application for *habeas corpus* by holding:

> Based on art. 7(2) of the FC, the principle of double jeopardy applied only in a case where a person has earlier been acquitted or convicted of an offence and is charged again for the same offence. In the present case, the appellant had neither been convicted nor acquitted of the offence charged in the sessions court. He was only charged therein and the case was still pending. The allegation of facts in the DO which contained a charge as that of the sessions court was a mere allegation. The applicant was not being tried. This was a detention without a trial. Ordinary criminal proceedings in which charges are preferred and procedures under the Ordinance are two different and separate matters. Accordingly, there was no violation of art. 7(2).

[6] Despite this case having distinguished between criminal proceedings and that under the Ordinance, Mr. Sundarajan somehow still wanted to draw a distinction that in the instant case, the applicant had been charged and sentenced giving rise to double jeopardy and this, he stressed had not been rebutted by the first respondent in his affidavit in reply.

[7] The learned federal counsel refuted the said contention by drawing the court's attention to the Federal Court decision in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia and Ors* [2005] 3 CLJ 914 where it was emphasized in the course of concluding that the first issue, being that the Deputy Minister did not consider whether criminal prosecution ought to be taken against the applicant, had no merit:

> These are two distinct powers under two different laws. The Attorney General and the Minister, respectively, have power given to them by the respective laws. So, just as the Attorney General has power to institute

proceedings but not the power to order detention, the Minister has power to order detention but not to institute proceedings. Just as it is not within the power of the Attorney General to consider making an order of detention, it is also not within the power of the Minister to consider the institution of criminal proceedings. What is the purpose of considering doing something that they, respectively, have no power to do? Indeed, if the Minister considers the institution of criminal proceedings, in a judicial review application, it would not be surprising to hear arguments that the Minister has exceeded his jurisdiction or that he has taken into consideration matters which he should not.

The law also does not require the Minister to refer the matter before him to the Attorney General first for his consideration whether to institute criminal proceedings before considering whether to issue a detention order. Similarly, the law does not require otherwise, ie, for the Attorney General to refer the matter before him to the Minister first for consideration whether the detention order should be made before considering whether to institute criminal proceedings. Their powers are separate and provided for by different laws. Indeed, even the powers of the police to arrest a person that leads to the institution of criminal proceedings and to detain a person with a view of detention by the Minister are provided by different laws, the former mainly under the Criminal Procedure Code, the latter under the Ordinance.

So, the first thing that one should be clear about is that there are two distinct and separate laws for different purposes to be exercised by two different authorities. Once we get that clear, then the argument that the Minister should have considered the institution of proceedings first collapses. The Minister has no such power and indeed, it will be *ultra vires* his jurisdiction to do so. That should dispose of the first argument without even any reference to case law.

[8] After having considered the arguments of both sides, it is my decision to dismiss the application. I believe Mr. Sundarajan had totally misconceived the decision in *Saravanan KS Somu (supra)* which was really not in his favour because as of 19 June 2009 when the detention order was issued, the charge was still pending against the applicant who pleaded guilty subsequently on 23 July 2009. He was not convicted as of the date of the detention order. The situation hence was the same. Mr. Sundarajan might have missed this point but nevertheless his initial argument that the applicant had been previously sentenced leading to double jeopardy is without basis too for the same reason.

[9] Article 7(2) of the Federal Constitution would obviously be applicable only in a case where a person has been charged previously, was convicted or acquitted of that charge and was again charged for the same offence except when there was an order for

retrial as so provided. This is plainly what the article means about repeated trials. The applicant in the present case was not charged again and tried but detained without trial under the Ordinance. Although the applicant had been charged prior to the issuance of the detention order and subsequently convicted for the same offence, it is my view that the first respondent was not barred from issuing the detention order based on facts arising from the same offence. Using the broad ratiocination of the Federal Court in *Lee Kew Sang (supra)*, the first respondent had executed his power under the Ordinance that is totally separate from the Public Prosecutor's power to institute criminal proceedings under the Criminal Procedure Code. In *Lee Kew Sang*, the argument that the Minister should have considered the institution of criminal proceedings first was dismissed. By the same analogy, the argument by the applicant in the instant case that he was already charged and/or convicted and sentenced for the same offence and ought not to have been detained on the same ground must fail because the first respondent had obviously executed his power and prerogative to issue the detention order under the Ordinance without reference or subject to criminal proceedings had or pending against the applicant. He had wielded his power within his own jurisdiction under the Ordinance.

[10] My view is further fortified by the fact that there were six other allegations of facts that were relied upon and considered by the first respondent prior to issuance of the detention order. These were the six other allegations of facts on which the order was based:

Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan:

1. Bahawa kamu merupakan seorang ahli kumpulan Thug Geng "Satu Hati" yang aktif di kawasan Batu 14, Puchong, Selangor. Kamu telah melibatkan diri dalam kegiatan kongsi gelap sejak berumur 20 tahun dan mempunyai lebih kurang 40 hingga 50 ahli kumpulan.

2. Bahawa kamu pada 19.07.2007, jam lebih kurang 1.30 pagi, bertempat di No. 30, Jalan BPU 1, Batu 14, Puchong, Selangor, telah meminta wang perlindungan sebanyak RM1,200.00 daripada mangsa seorang lelaki India dan telah mengugut akan membuat kacau serta memecahkan dan membakar kedai mangsa sekiranya mangsa tidak membayar wang perlindungan kepada subjek.

3. Bahawa kamu pada 20.07.2007, jam lebih kurang 12.30 pagi, bertempat di No. 30, Jalan BPU 1, Batu 14, Puchong, Selangor, telah meminta wang perlindungan sebanyak RM1,200.00 daripada mangsa seorang lelaki India dengan melibaskan parang panjang ke arah mangsa. Kamu telah menendang dan menumbuk mangsa

di bahagian perut dan dada serta mengikat tangan mangsa dan mengugut akan memecahkan pintu cermin kedai mangsa sekiranya mangsa tidak membayar wang perlindungan kepada kamu.

4. Bahawa kamu pada 26.08.2007, jam lebih kurang 9.55 malam, bertempat di hadapan sekolah Cina Batu 14, Puchong, Selangor, bersama (3) orang rakan sejenayah dengan niat bersama telah menetak dan memukul mangsa seorang lelaki India dan bapa mangsa dengan bersenjatakan parang panjang. Kamu juga mengugut akan membunuh bapa mangsa. Akibat dari kejadian tersebut, mangsa telah mendapat kecederaan di bahagian kepala dan seluruh badan manakala bapa mangsa mengalami cedera parah di bahagian kaki, kepala dan tangan. Bapa mangsa tidak dapat menjalankan kerja seperti biasa akibat kecederaan yang dialaminya.

6. Bahawa kamu pada 14.08.2008, jam lebih kurang 1.15 petang, bertempat di luar pagar Sekolah Menengah Puchong Utama 1, Puchong, Selangor, bersama (3) orang rakan sejenayah dengan niat bersama telah mengugut mangsa seorang perempuan India dan keluarga mangsa sekiranya mangsa atau bapa mangsa membuat laporan polis.

7. Bahawa kamu pada 14.08.2008, jam lebih kurang 2.50 petang, semasa mangsa berada di rumah No. 9, Jalan Meranti 1, Taman Puchong Impian, Batu 14, 47100 Puchong, Selangor, telah menerima panggilan telefon dari kamu mengugut akan potong dan bunuh mangsa serta mengacau anak perempuan mangsa kerana mangsa telah membuat laporan polis ke atas kamu.

[11] The same facts that led to the criminal charge that comprised the fifth allegation of facts earlier reproduced were not solely considered by the Deputy Minister.

[12] Strictly speaking, there was no violation of art. 7(2) as by the detention, the applicant was not tried again for the same offence that merely formed one allegation of facts among others to enable the first respondent to arrive at his decision. There was no repeated trial for the same offence. The applicant was clearly not exposed to double jeopardy as he was not charged and tried again in a court of law.

[13] The application is accordingly dismissed.